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Why go to court in Europe? An analysis of cartel appeals 1995–2004

Christopher Harding and Alun Gibbs*

Appeals; Cartels; EC law

This study analyses the legal argument in and outcome of appeals against decisions of the European Commission in EC cartel cases over the last decade. It takes as its starting point the argument presented by Montag (1996) that defects in procedure or unsubstantiated findings of fact led to a high proportion of successful appeals in the 1980s and earlier 1990s, and so to a "crisis in cartel infringement procedure". The discussion here probes the quantitative and qualitative methodology of assessing the outcome of such appeals, with particular reference to cases dealt with since the middle of the 1990s. A reading of this sample suggests a low rate of success for cartel appellants, both in terms of legal argument and reversal of the Commission's decisions. This in turn prompts questions concerning the motivation behind such appeals, the deployment of resources in relation to this kind of procedure, and the role of the procedure itself in the European legal order.

Introduction

Appeals from European Commission competition decisions in cartel cases quantitatively amount to a significant proportion of the jurisdiction exercised by the European Court of First Instance ("CFI"), and a number of these cases also subsequently find their way to the Court of Justice ("ECJ") as appeals against the CFI's decisions. In terms of the time taken up by and the resources committed to such litigation (not to mention the number of pages in the *European Court Reports*), this area of activity must be seen as a major legal industry at the European level. Commission cartel decisions are not so numerous in themselves, but invariably involve a number of companies as members of each cartel, and although the Commission's investigation relates to a cartel as a whole, decisions and sanctions are applied individually.¹ Most cartel decisions are therefore complex in the way in which they apply to a range of actors, some of whom almost automatically appeal against these individual components of each decision on a number of grounds. The cases tend to be factually complicated and the CFI's practice has been to examine both the evidence and legal points of argument, in effect acting as a trial court rather than an appellate body.² The outcome therefore is a voluminous litigation, and one which, at least in the past, has been significant in its development of corporate defence rights in this supranational legal

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¹ See the discussion below on the methodological issues relating to the quantitative assessment of this kind of litigation.

² Again, see below on the reasons for this.

context.³ The present study is concerned with both the legal nature and significance of this area of European litigation, and also with the practical implications of its extent. We wish to pose some fundamental questions about this sector of litigation: why do companies appeal so frequently and doggedly against cartel decisions, and with what degree of success? Then, we may ask, what do the answers to these questions tell us about the nature of this area of judicial process at the European level?

This enquiry has been prompted partly by the nature of some of the commentary on European competition law in relation to cartels. The thrust of this kind of writing⁴ has been very critical of the Commission's conduct of cartel cases, in terms of the rigour and fairness of its procedure, and has tended to view the frequency of litigation as evidence of regulatory malaise. The underlying assumption in this kind of commentary has been that appeals should be expected since matters of both evidence and procedure have been handled in an unsatisfactory fashion and it has therefore been necessary for the CFI to go through Commission decisions with a fine-toothed comb to ensure fair treatment. A classic example of such writing is provided by a paper published by Montag in 1996.⁵ Referring to the "crisis in which the cartel infringement procedure finds itself today" the gist of his argument is summarised in his statement that :

"A close look at the Commission's practice in infringement proceedings to date makes clear the necessity for reform in this area, especially when looked at from the perspective of the subjects of the proceedings, that is, from the undertakings' point of view. Undertakings often feel that they are treated unfairly and that their procedural rights are violated It will be shown that this is not simply a theoretical threat or fear but that the violation of undertakings' rights in infringement proceedings follows almost logically from the way the proceedings are administered by the Commission. Secondly, it is submitted that because undertakings are uncomfortable with the way with which infringement proceedings are carried out and decisions are reached, Commission decisions imposing fines lack acceptance. The record of successful challenges of such decisions in the Community courts proves that this lack of acceptance is often justified."⁶

Montag's argument, in essence, is that companies allegedly involved in illegal cartels feel that they have not been fairly treated and this is borne out by an analysis of the outcome of appeals before the European Courts (initially the ECJ, then the CFI when the latter was established). His sample comprised all competition cases up to his date of writing (not just but mainly cartel cases) in which at a total of least 3 million ECUs in fines had been imposed. In fact, the greater part of this sample related to the period between the mid-1980s and 1994. In the first part of our main discussion we shall test Montag's claim against his own sample. In the second part of the main discussion, we have compiled data relating to the outcome of all cartel appeals decided in the subsequent 10-year period

³ For an overview and discussion of the development of this area of law, see Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (Oxford University Press, 2003), Chs 5, 6 and 7.

⁴ Much of it produced by legal practitioners specialising in "corporate defence" at the European level. See the discussion of such writing at pp.206–208 of Harding and Joshua, n.3 above, and note Jones and Sufrin's description of some of the commentary in this area as "partisan": Alison Jones and Brenda Sufrin, *EC Competition Law: Text, Cases and Materials* (Oxford University Press, 2001), p.939.

⁵ Frank Montag, "The Case for a Radical Reform of the Infringement Procedure Under Regulation 17" [1996] 17 E.C.L.R. 428.

⁶ Cited above at pp. 428–429.

(1995 to 2004), in order to draw a comparison, in terms of judicial findings regarding either insufficiency of evidence or procedural laxity.

But first it would be helpful to say something about the nature of the legal process under discussion here, and also explain the methodology of this kind of survey.

Cartel appeals in European law

In formal terms what are here described as "cartel appeals" are proceedings brought for annulment of formal Commission decisions establishing breaches of Art.81(1) (ex Art.85(1)) of the EC Treaty and, usually, imposing fines in respect of such breaches. This comprises part of the jurisdiction awarded to the Community Courts under Art.230 (ex Art.173) and Art.229 (ex Art.172) of the EC Treaty (respectively, the action for annulment and the "unlimited jurisdiction with regard to penalties", or "plenary jurisdiction"). More specifically it is provided in Art.31 of Regulation 1/2003 (replacing Art.17 of Regulation 17/62) that :

"The Court shall have unlimited jurisdiction within the meaning of Article 229 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed."

Since 1990 such cases have been heard by the CFI, thereby relieving the ECJ of a time-consuming and factually complex area of its jurisdiction.⁷ Properly speaking, this is an area of judicial review in terms of the grounds for overturning the Commission's decisions, but the Court's ability to alter the quantum of the penalty contained in such decisions also characterises the process as a kind of sentencing appeal. Since the jurisdiction is "plenary" or "unlimited" the Community Courts, and especially the CFI, have been free to engage in a review of facts as well as law. This is carried out according to what has been described by Judge Vesterdorf as the principle of "unfettered evaluation of evidence",⁸ although the CFI refers to this role in more mundane terms, simply repeating from case to case that "it is necessary to verify whether the Commission has established to the required legal standard its findings of fact".⁹ There has been surprisingly little comment on the development of CFI's review of evidence in competition cases, especially since this has necessarily entailed the concomitant development of principles of evidence.¹⁰ However, the practical outcome is that such cases comprise to a large extent argument about the Commission's use of evidence as justification for imposing fines or fines of a certain amount. In cartel appeals, there tend to be two main categories of argument used to challenge Commission decisions: sufficiency of evidence (in effect, a question of standard of proof); or procedural defect, but usually relating to issues of admissibility of evidence or opportunity to test evidence.

⁷ On the establishment of the CFI, see e.g. L. Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities* (5th ed., Sweet & Maxwell, 2000), Ch.5.

⁸ In his opinion as Advocate General for the Polypropylene Cartel appeals : Case T-1/89, *Rhône-Poulenc v Commission (Polypropylene Cartel appeal)* [1991] E.C.R. II-867 at p.954.

⁹ e.g. in the same proceeding, [1991] E.C.R. II-867 at p.1048.

¹⁰ See the discussion in Harding and Joshua, *Regulating Cartels in Europe*, cited above n.3, at p.174 *et seq.*

Most of this crucial evidence relating to cartels concerns prohibited serious anti-competitive activities such as price fixing, market sharing, agreed limitations on production and bid rigging. There is little argument about the illegality of this kind of conduct in itself, which is largely accepted on all sides. Nor do most cartel appellants usually deny in categorical terms the existence of the cartels in question which is, by that stage and in factual terms, well enough established. What is contested more precisely by each appellant is the sufficiency of the proof that individual companies were involved, or involved to the extent alleged. Advantage is taken of the high standard of proof required in such cases, which is comparable to the more exacting standard associated with criminal proceedings at the national level (for example being proven "beyond reasonable doubt").¹¹ In most of these cases, therefore, it is being argued that the Commission's evidence is not sufficiently strong, or should not be used for procedural reasons. Although of necessity cartel litigation in the earlier period was productive of new law, relating to the use of evidence and rights of defence, it will be argued below that this is much less the case in recent years, during which the emphasis has shifted away from law development to fact verification of a very repetitive nature.

But the evolution of the CFI's role in such cases also has to be seen in a longer-term constitutional perspective. This springs from the role originally accorded to the Commission in relation to competition law and policy. For a number of reasons the Commission's role in this sector was distinctive, combining the formation of policy and development of legal rules with a direct responsibility for application and enforcement of the rules.¹² By the later 1970s this enforcement role had grown to encompass a confrontational process of investigation, establishment of infringements and application of sanctions in relation to the most serious breaches, typically in cases involving cartels organised for purposes of price fixing, market sharing and like activities. At this "sharp end" of the enforcement spectrum, the Commission found itself playing out a number of roles, all suggestive of criminal procedure in a national context: investigator; prosecutor; trial court; and sentencer. Formal decisions in such cases would, on the basis of the collection and presentation of evidence and a hearing relating to that evidence, comprise a finding of infringement, coupled with the application of sanctions. Although these functions were in practice divided among different personnel within the Commission, in purely formal terms the whole process was encapsulated in a single instrument, in the production of which the same institution acted as prosecutor, judge and executioner. Not surprisingly, by the mid-1980s, this situation was subject to criticism founded on basic constitutional notions of due process and separation of powers.¹³ To some extent, the ECJ side-stepped such criticisms by falling back on the argument that the Commission's powers and procedure remained "administrative", and so beyond the due process requirements associated, for instance, with Art.6 of the European Convention on Human Rights.¹⁴ At the same time the Commission has resisted suggestions that its competition enforcement role be transferred

¹¹ See again the discussion by Advocate General Vesterdorf in the *Polypropylene* case, n.8 above, [1991] E.C.R. II-867 at p.954.

¹² For a useful account, see: Ian Forrester and Christopher Norall, "The Laicisation of Community Law: Self-Help and the Rule of Reason: How Competition Law Is and Could Be Applied" (1984) 21 C.M.L.Rev. 11 (a now somewhat dated source, but still a valid analysis). More generally, see D. G. Goyder, *EC Competition Law* (4th ed., Oxford University Press, 2003), Ch.4.

¹³ See Harding and Joshua, n.3 above, at pp.184-190.

¹⁴ Cases 100-103/80, *Musique Diffusion Française v Commission* [1983] E.C.R. 1880.

to a separate body such as a "European Cartel Office".¹⁵ In this context, the setting up of the CFI and the latter's uncontested assumption of incursive powers of review over Commission decisions has for practical purposes taken the sting out of the constitutional objections. In practice, the Commission's role has become much more that of an enforcement agency, establishing infringements and deciding on sanctions, these decisions being judicially assessed in a kind of trial hearing before the CFI, with further appeal on legal issues still possible to the ECJ. This outcome was suggested by one commentator in the early 1990s:

"Regulation 17 does not set out any separation of powers. The Commission is investigator, prosecutor and 'judge'. However Regulation 17 also grants full jurisdiction to the courts to review the Commission's decisions on fines. This broad judicial review in a way offsets the lack of separation of powers."¹⁶

These observations on the nature of the legal process underlying cartel litigation need to be borne in mind in any critical evaluation of the litigation itself.

The measurement of cartel litigation: quantitative and qualitative methodology

Analysing the legal procedure discussed above raises a number of methodological issues, relating to both a qualitative profile of the features of such cases (such as the membership of the cartels, the grounds of challenge raised in the appeals and the kinds of outcome) and any quantitative assessment of the presentation of argument and outcome of the cases. A survey of such litigation may reveal two particular matters of interest: a "character profile" of such cases; and some assessment of the degree of "success" achieved by appellants.

The temporal aspect

Montag's sample covered a time period of almost 20 years (1973 to the end of 1994), but the great majority of his cases comprised decisions handed down by the Commission between 1984 and 1994, since his sample was limited to decisions imposing a minimum of 3 million ECUs in fines. In effect, therefore, his period for survey was 10 years. Our survey takes the following period of almost ten years (1995 to 2004) by way of comparison. Although there was a limited number of cartel "prosecutions" taken through to appeal within this 10-year period (less than 20), the number of individual appeals and grounds of challenge arising from that small number is considerable, as will be seen below. A 10-year period may therefore be considered to present a significant body of data.

The concept of cartel litigation

The subject-matter of this research is a particular type of proceeding within the field of EC competition regulation. This kind of proceeding arises from the Commission's investigation of suspected cartel arrangements contrary to Art.81(1) of the EC Treaty. Specifically,

¹⁵ C.-D. Elhermann, "Reflections on the ECO" (1995) 32 C.M.L.Rev. 471.

¹⁶ Luc Gyselen, "Fines in EC and US Competition Law" in *Procedure and Enforcement in EC and US Competition Law* (Piet Jan Slot and Alison McDonnell eds., Sweet & Maxwell, 1993), p.88.

what are being surveyed are appeals against "adverse" decisions¹⁷ in which the Commission establishes the existence of an unlawful cartel and then (usually) also imposes fines on the individual companies as participants in the cartel. Although the term "cartel" has no precise legal definition in the context of European law, the Commission's own view of what amounts to a cartel infringement is fairly clearly stated in its own glossary of competition terms, as an:

"arrangement between competing firms designed to limit or eliminate competition between them, with the objective of increasing prices and profits of the participating companies and without producing any objective countervailing benefits."¹⁸

The term is therefore commonly applied to horizontal anti-competitive arrangements which are both manifestly injurious and without justification in terms of competition policy. This distinctively egregious quality of cartel activity is now recognised in some jurisdictions through the criminalisation of individual participation in cartel planning and decision-making, so confirming the separation of cartel and other kinds of competition case. Thus cartel proceedings are distinguishable from other types of judicial proceeding in the field of competition law, in particular: (a) those relating to decisions establishing other kinds of infringement (for instance, abuse of market dominance under Art.82; or non-collusive (usually single company) violations of Art.81 (such as a highly restrictive distribution or licensing arrangement)); and (b) references by national courts to the ECJ for preliminary rulings on the interpretation of competition rules, under Art.234 of the Treaty. It should be noted, however, that we decided to exclude from our sample a number of "shipping conference" cases, possessing some cartel-like characteristics in terms of anti-competitive practice, but lacking some of the furtive and underhand ("egregious") quality of the classic cartels. Some of these cases, for instance, came to the Commission's notice through being voluntarily notified in the hope of gaining exemption under Art.81(3).¹⁹ On the other hand, we have included steel cartels dealt with under Art.65 of the Coal and Steel Community Treaty, which are in substance indistinguishable from cartels under Art.81.

Cartel cases are thus distinctive in legal and economic terms. They have a clear generic identity, based upon collusion between a number of parties which is aimed at clearly and seriously anti-competitive practices, typically price fixing, market sharing, capping production and bid rigging as between competing suppliers. In terms of legal process, such cases require a major effort of investigation, sometimes lasting years rather than months, unless expedited (as has happened in some recent cases) by the quick provision of evidence by "whistle blowers" seeking leniency.²⁰ The necessary commitment of regulatory resources and difficulties in securing evidence explains the relatively small number of cartels which have become subject to "prosecution".

¹⁷ All decisions will be adverse in this sense; if the Commission is not able to establish an infringement to its own satisfaction, it will not proceed to a formal decision but will simply close the file.

¹⁸ Commission, Directorate-General for Competition, *Glossary of Terms Used in EU Competition Policy* (July 2002). The definitions used in this glossary are expressly stated to not have legal value.

¹⁹ During the relevant period, examples of such shipping conference cases included the Far Eastern Freight Conference (FEFC); the Trans Atlantic Agreement (TAA); the Trans Atlantic Conference Agreement (TACA) and the Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA).

²⁰ On the development of leniency programmes, see Harding and Joshua, n.3 above, Ch.8.

The other feature of a cartel case which is significant for present purposes is their "joint and several" character. The Commission's investigation will relate to the cartel as a whole, since the collusive cartel activity is the main point of the investigation. Similarly, its formal decision will relate to the cartel as a whole. But legal responsibility and liability reside with the individual companies participating in the cartel and any orders or sanctions relating to the cartel will be addressed to the individual members severally within that overall decision. It is the participants, not the cartel, who possess legal personality, and so receive the decision and, in turn, appeal against it, or the part relating to that particular company.

This distinction between cartel and participant may complicate any quantitative or qualitative assessment, since it is possible to count either: (a) cartel prosecutions and decisions; or (b) individual components of those decisions and fines relating to the members of the cartel. Since the main interest of this research lies in the appeals arising from cartel decisions, and these are made by individual participants, it would seem appropriate to take *each appeal* rather than the case involving the cartel as a whole as the main unit of assessment. We shall therefore use the terms "cartel case" and "cartel appeal" to refer to an appeal by one company against that part of the overall cartel "decision" addressed to and imposing a sanction against that company.²¹ Montag's survey, on the other hand, took the cartel "decision" as the main unit of assessment, then listing for each decision the number of companies involved and the number of different legal outcomes (for example for the *Woodpulp Cartel* in 1984: 36 undertakings fined; 24 appealed, 19 of which resulted in complete annulment of the decision as addressed to them, and 5 in reduced fines (which then appears as quite a poor outcome for the Commission)).

Membership of cartels

Information relating to the membership of each cartel is easily obtained from each of the Commission's cartel decisions and the judicial records of appeals and this may, over the sample as a whole, be used to provide a profile of cartel participation and corporate delinquency. The main points of interest in this respect would comprise: the identity of companies participating in this kind of arrangement; the extent of their recidivism over time; their degree of involvement (for example as ringleader, or passive follower), as a measure of delinquency; the sanctions imposed on individual companies over time, as another measure of delinquency; and their degree of success in legally challenging decisions and sanctions. There will be further information available from the Commission's decisions relating to the markets subject to cartelisation and the methods adopted by the cartels, which can add to such a profile.

One possibly complicating feature of cartel participation results from occasional corporate restructuring and changes in the name and identity of individual members of a cartel. Care has to be taken, therefore, in noting such changes when constructing a profile of cartel participation or counting cases. Sometimes this may reflect simply a change of corporate

²¹ But note one further complication in using the judicial sources and Court Reports. For purposes of the Courts' consideration of these cases, individual appeals are sometime joined together so as to lead to a single judgment, if the appeals raise the same legal points ("Joined Cases"). Care needs to be taken, therefore, in counting the number of appeals from such a source.

name, but in other cases corporate re-structuring may have a bearing on the nature or extent of participation in the cartel, or attribution of liability (for instance, that of a "successor" company who has taken over a cartel participant, or that of a parent company in relation to the cartel participation of a subsidiary). The point may be illustrated by the following footnote in Advocate General Vesterdorf's opinion for the Polypropylene Cartel appeals to the CFI in 1991, in relation to the Italian company Montedipe:

"Until the end of 1980 the parent company of the Montedison group, Montedison SpA, itself undertook polypropylene production, but from 1 January 1981 production was transferred to the wholly-owned subsidiary Montepolimeri SpA to which the Statement of Objections was addressed . . . an internal reorganisation of the Montedison group took place, which resulted in the decision being addressed to Montedipe SpA which is the applicant in Case T-14/89."²²

Another interesting example of corporate change may be taken from the Steel Beams Cartel (appeals by the cartel members dealt with by the CFI in 1999) and the Stainless Steel Cartel (dealt with by the CFI late in 2001), both included in our 1995–2004 sample. Two of the 11 members of the Steel Beams Cartel were the German companies Thyssen Steel and Krupp Hoesch. These companies reappeared in the Stainless Steel Cartel, but as a single entity, since they had subsequently merged in 1995 to form Krupp Thyssen. Merger is, in a sense, a legitimate alternative to collusion, but take-over may not be so. The two appellants from the Stainless Steel Cartel were Krupp Thyssen and the Italian company Acciai speciali Terni (AST). The cartel was alleged to be in operation from 1994 until the date of the Commission's decision in 1998; Krupp Thyssen had acquired all the shares in AST in 1996, but the latter remained a separate company, and so both were prosecuted in respect of their cartel activities.²³

Argument and grounds of appeal

In practice, certainly from the 1990s onwards, a high proportion of cartel participants subject to a decision imposing fines have appealed such a decision to the CFI, and on as many grounds as possible. Each appeal may therefore comprise a range of legal arguments, totalling a large number across the whole of the cartel, and also comprising a great deal of repetition across the whole cartel. Yet it is upon each argument or ground of appeal that the cases will be judicially decided. These arguments will be directed towards annulment of the decision against that company as the best outcome, or reduction of the fine as a lesser result.

As already noted, these arguments fall into two main categories. First, it may be argued that the Commission's evidence is insufficient for purposes of establishing the alleged involvement or degree of involvement (such as the period of participation) in the cartel's activities. In relation to such claims, the CFI fully enters its role as a trial court and reviewer of facts, assessing the strength of the Commission's case in evidential terms. Secondly, it may be asserted that there is a legal or procedural defect in the Commission's

²² [1991] E.C.R. II-878. By the time of the subsequent appeal to the ECJ in 1999, the appellant had become Montecatini.

²³ For details of these corporate changes, see the first paragraphs of the CFI's judgment in Case T-45/98, *Krupp Thyssen and Acciai speciali Terni v Commission* [2001] E.C.R. II-3757.

handling of the case, such as to justify the annulment of the decision in whole or in part. Such arguments may allege violation of rights of defence (such as "access to the file"), or the use of evidence which is inadmissible (for instance, through abuse of investigatory powers or improper interrogation), or legal error in the calculation of the fine or application of leniency rules. It will be seen that this second category of argument achieved a fair measure of success during the 1980s, but rather less so in more recent years, suggesting that the Commission had drawn lessons and tightened its procedure and application of law.

A survey of the deployment and result of such arguments may provide both a qualitative profile of legal argument in the context of this kind of litigation, but also some measure of the "success" of the appeals. Annulment or fine reduction as successful outcomes depend essentially on the degree to which the CFI (and ECJ) accept these arguments, and so are put forward here as the essential measure of both success from the appellant perspective, but also (returning to Montag's argument) of malaise in regulatory system. In effect, these appeals provide the opportunity to test legally the rigour of the Commission's efforts to regulate cartel activity, and a quantitative assessment of how well these complaints fare in court provides a reflection of that regulatory rigour.

One further element in the judicial decision may also be used to measure the extent of successful outcome, whether it be from the appellants' or the Commission's perspective. The Court's decision on the award of costs (again either in full or part) will reflect the strength of the case in legal terms. In particular, appellants may be penalised for spurious or especially worthless claims, not only by losing the case but also in having costs awarded against them. Award of costs is thus another material indicator of the legal outcome and something which may be used as a measure over a number of cases.

Further appeal to the ECJ

Finally, it should be noted that increasingly cartel participants who have not been successful before the CFI may avail themselves of the right of appeal against the latter's decisions to the ECJ. These further appeals may be used again as indicators of appellate success, although it will be seen that these proceedings have a very repetitive nature. A proven low rate of success for appellants raises further questions about incentive and motive, especially in view of the extent to which this extra layer of appellate activity protracts the proceedings and ties up resources.

Montag's survey: a tale of regulatory malaise

As noted above, Montag's paper and survey published in 1996 paints a graphic picture of regulatory malaise and system in crisis. In the next section of the discussion, we consider critically his account, both in terms of its argument and the use made of his sample of cases.

Argument

First of all the position and line of argument adopted by Montag merits some comment. Broadly, his stated objective is to test whether the Commission's practice and procedure

in adversarial competition cases "lead to acceptable results from a public policy perspective". In carrying out this exercise, his stated criteria of what is acceptable appear to be: (a) a fair and unbiased proceeding; (b) a "high level of acceptance" on the part of those subject to the procedure, so as not to lead to a quasi-automatic appeal; (c) a good chance that the Commission's decision will be upheld on appeal; and (d) an acceptable duration for the procedure. There is likely to be little quarrel with the first criterion, though its application may not be straightforward. The second criterion, however, appears to be highly subjective, yet it figures significantly in Montag's argument ("undertakings often feel" that they are treated unfairly, and "undertakings are uncomfortable").²⁴ The third criterion appears problematical in its predictive expression, and might be more happily cast as an *outcome* of research, for instance as a consistent and persistent pattern of annulment of Commission decisions or reductions of fines. The last requirement begs further questions: what would be an "acceptable" duration, and from whose perspective? If the problem is seen as one of over-long process, who is responsible for that situation and may there not be also criticism of the procedure being too short²⁵ or hurried?

Moreover, alongside some doubts regarding the above criteria being employed in this analysis, there are also some significant *assumptions* employed in Montag's argument. First, there appears to be an assumption of objective unfairness in the nature of the Commission's procedure: it is asserted that a violation of defence rights follows logically from the way in which the procedure is administered.²⁶ It is not entirely clear what is being referred to here—the procedure itself, as laid down in law, or the way in which it is being administered by the Commission. The two aspects appear to be mixed together in the subsequent discussion. But there would appear to be little support in either line of criticism from the Community Courts at that time, as may be seen from the statement by Advocate General Vesterdorf, in what may be regarded as a landmark opinion²⁷ delivered in relation to the appeals to the CFI on the part of the participants in the Polypropylene Cartel. Responding to a similar line of argument put forward by one of the appellants, Shell, he commented :

"I agree with the Commission that any errors made in dealing with the present complex of cases do not warrant the conclusion that the internal organisation of the Commission was arranged in a way that it may be assumed from the outset that it leads to mistakes of the sort the applicant considers it has demonstrated."²⁸

A second and somewhat related assumption, based on a number of features of the procedure in cartel cases, is that defence arguments are not properly considered. This part of Montag's argument appears to be largely circumstantial, since in support of this assumption he cites the following: the identity of wording between the Commission's Statement of Objections ("SO") and the decisions eventually adopted; a presumed lack of

²⁴ Montag, n.5 above, at p.429.

²⁵ *e.g.* the Commission was criticised in the *Commercial Solvents* case for allowing insufficient time for the preparation of legal argument: Joined Cases 6 & 7/73, *Commercial Solvents v. Commission* [1974] E.C.R. 223 at 274.

²⁶ Montag, n.5 above, p.429.

²⁷ The opinion accompanies Case T-1/89, *Rhône-Poulenc v Commission* [1991] E.C.R.-II 867. The decision had been taken, exceptionally, to assign an Advocate General to the case in view of its legal significance and complexity. The opinion ranks as a full and considered view of cartel law and the procedural aspects of dealing with cartels and Judge Vesterdorf took the opportunity to expand on the theory of the subject.

²⁸ [1991] E.C.R. II-887.

influence on the part of the Hearing Officer; the length of the procedure; and "human nature"—that the Commission's officials have a professional interest in winning their case.²⁹ As a result of all this, in Montag's view, there results (even more remarkably) a reversal of the burden of proof:

"As a result, undertakings are faced with a situation which, as an inevitable consequence, leads to a reversal of the burden of proof in the administrative proceeding as well as in any ensuing court proceedings and therefore to a serious infringement of the principle *in dubio pro reo*."³⁰

Thus (but also arising from the "peculiarities of Art.173") the burden of proof is reversed on appeal. Moreover, it is asserted, the CFI examines the Commission decision "only for defects". Yet, what else should be expected from an appellate procedure? Perhaps the real meaning of the argument is a criticism that it should be necessary for these matters to be resolved in this way, by being taken to the CFI.

In summary, Montag seems to have claimed that a combination of the procedure itself and the way in which it had been administered by the Commission had led to a violation of defence rights. Some of this argument is based on the assumptions listed above, but he then proceeds to back up the claim by more empirical argument from his sample of cases. This is done with reference to two kinds of data: the rate of appeals, and in turn their degree of success. However, the decision to appeal is not in itself an indication of matters being (objectively) amiss, but rather what Montag refers to as the undertakings' (subjective) "lack of acceptance" of the Commission's decision against them. The outcome of the appeal may be seen as a more convincing indicator of regulatory health or malaise, but, as will be shown, requires careful interpretation.

Sample

Montag's sample comprises Commission decisions in competition proceedings between 1973 and 1994, imposing a minimum total of 3 million ECUs in fines in each case. He lists 29 such decisions, but only 23 of these are cartel decisions in the sense explained above. Five out of that 23 had not yet been dealt with by the CFI and so could not be used to measure outcome in terms of judicial control. Of the remaining 18, 5 were not challenged at all,³¹ leaving only 13 challenged cartel decisions. Montag's number of challenged decisions amounts to 13 because he oddly breaks down the Soda Ash Cartel case into four separate decisions, but does not separate any of the other Commission decisions in this way. Of the 13 (or arguably 10) challenged decisions, one was completely upheld by the CFI (Dutch Building Materials in 1995). *There are therefore 12 (or arguably 9) out of 23 Commission decisions against cartels in almost a 20-year period, in which there were appeals which succeeded in some way.* A "successful" appeal would mean either annulment of the whole decision or partial annulment with reduction of fines. Only three cartels succeeded in having the whole decision annulled (PVC, LdPE and Soda Ash). Of

²⁹ Montag, n.5 above, pp. 429–430.

³⁰ Cited above at p.430.

³¹ Benelux Flat Glass (1984), Zinc Producer Group (1984), Peroxide (1984), Meldoc (1986), French African Shipping (1992).

these, the Commission later re-adopted its decisions in PVC and Soda Ash. Details of the challenged cartel decisions are summarised in Table One below.

TABLE ONE: Challenged cartel decisions imposing fines of at least 3 million ECUs, 1973–1994 (source: Montag [1996])

Cartel	Number of companies fined	Judgment	Outcome of appeal to CFI or ECJ
Sugar	17	[1975] E.C.R. 1663	7 annulled, 10 fines reduced
Wood Pulp	36	[1993] E.C.R. I-1307	19 annulled, 6 fines reduced
Polypropylene	15	[1991] E.C.R. II-867	9 upheld, 6 fines reduced
PVC	14	[1992] E.C.R. II-315	Whole decision inexistent
Italian Flat Glass	3	[1992] E.C.R. II-1403	1 annulled, 2 fines reduced
LdPE	17	[1995] E.C.R. II-729	Whole decision annulled
Welded Steel Mesh	14	[1995] E.C.R. II-791	6 upheld, 5 fines reduced
Soda Ash (ICI)	1	[1995] E.C.R. II-1775	Annulled
Soda Ash (Solvay)	1	[1995] E.C.R. II-	Annulled
Soda Ash (Solvay/CFK)	2	[1995] E.C.R. II-	Annulled
Soda Ash (Solvay/ICI)	2	[1995] E.C.R. II-	Annulled
Dutch Building Materials	28	[1995] E.C.R. II-289	Whole decision upheld
Eurocheque Helsinki	2	[1994] E.C.R. II-49	1 annulled, 1 fine reduced

From this quantitative profile Montag concluded rather confusingly that 10 cartel decisions were “annulled in their entirety” and two other actions for annulment were “partially successful”. “Entirely annulled” appears to mean “the fines imposed by the Commission were lifted, or fines were quashed with regard to some and reduced with

regard to all other undertakings"—an odd sense of being entirely annulled. And following from this reading of appellant success, "the chances of obtaining an annulment of a decision based on this sample are slightly better than three to one", which provides "remarkable evidence of the Commission's poor record in reaching decisions imposing fines which come under scrutiny in Community courts".³² It is clear that by this stage the interpretation of the figures in the table has become very uncertain.

But that is not all: further reflection would suggest that also these figures as raw data need to be treated with some caution. What is shown in the last column of Montag's table are a number of annulments, confirmations of decisions and fine reductions, where annulment and confirmation are of uncertain scope and meaning. This display does not do justice to the complexity of the data in some of these cases, relating in particular to the number of appellants, separate grounds for argument, the legal significance of these grounds of appeal and the amount of and reasons for fine reduction. Closer examination of three of the cases in the sample may serve to make this last point clear.

First, the Sugar Cartel case, dealt with on appeal by the ECJ in 1973³³ illustrates the complexity of appellate argument in some cartel cases. This was a massive case in terms of legal argument—a large cartel, comprising 17 members, producing numerous grounds of appeal on points of both substantive law under Arts 85 and 86 of the EC Treaty and procedural law, and occupying 461 pages in the *European Court Reports*. A closer reading of the Court's judgment shows that virtually all the complaints relating to the Commission's procedure (those most relevant to bad regulatory practice) were rejected. The appellants succeeded for the most part in relation to genuinely difficult aspects of substantive law in relation to then untested points of legal principle, notably the application of Art.86 (abuse of market dominance) in a cartel context, and the impact of the common organisation of the market in sugar on conditions of competition. There was genuine uncertainty surrounding these issues, and if the Court had doubts about the Commission's application of the law, that was not necessarily a criticism of the latter's role. In fact, in terms of procedural rigour the Commission emerged from the litigation with a strong bill of health: the 7 points of annulment and 10 reductions of fines recorded in Montag's table hardly bear upon the Commission's procedure.

The diversity within the sample may then be appreciated by considering the first PVC appeal in 1992.³⁴ This was another major cartel, and 12 of the companies involved launched appeals, but this time in relation to a single point of argument, rendering the case legally less complex (though more controversial) than the Sugar Cartel litigation. In the PVC appeals the CFI joined all the cases, since each company was complaining about one matter: an alleged major procedural defect in the adoption of the Commission's decision (it had not been properly authenticated). The appeal did not relate at all to the investigation of the cartel, the conduct of the hearing, the sufficiency of the evidence, or the application of substantive law. In a strange judgment,³⁵ the CFI held that the lack of authentication was such an egregious error on the Commission's part that it rendered the decision not only null, but nonexistent. This ruling was subsequently overturned on appeal by the ECJ,

³² Montag, n.5 above, at p.432.

³³ Joined Cases 40/73, *Suiker Unie v Commission* [1975] E.C.R. 1663.

³⁴ Case T-79/89, *BASF v. Commission* [1992] E.C.R. II-315.

³⁵ See the discussion in Harding and Joshua, n.3 above, at pp.133–134

and the Commission went on to re-adopt the same decision (but properly authenticated) in 1994, and this second decision subsequently survived appeal to both the CFI and ECJ.³⁶ Simple numbers do not reveal the significance of the PVC litigation, whereas a longer and fuller reading of its history shows that it comprised a slap on the wrist for poor authentication, but that was the only problem—otherwise the Commission's handling of the case was vindicated.

Finally, a closer reading of the Polypropylene Cartel appeal is instructive. On one reading of the CFI's judgment,³⁷ this case might be reported as a "successful appeal" since some parts of the Commission's decision were annulled with consequent fine reductions. But the proceeding and its outcome should be put into context. First, it should be noted that this was just one of three related cartel prosecutions (along with those relating to PVC and LdPE) in the thermoplastics sector, involving largely the same participating companies, who then appear as multiple or even recidivist offenders.³⁸ The seriousness of the cartel activity could not have been in doubt; as Advocate General Vesterdorf remarked: "... the fines are not out of proportion, seen in relation to the very serious infringement in question".³⁹ In the second place, the success of the appeals was in fact quite limited. Out of the 14 appeals (1 of the companies fined, SAGA, paid the fine and did not appeal), 8 failed altogether with the Commission's decision being upheld. The six companies who achieved some success did so on the ground that their participation in the cartel had not been sufficiently proven for certain periods. Thus involvement in the cartel was confirmed in relation to all the companies, and the weakness in the Commission's case was some lack of evidence, and not any procedural or legal errors. This was hardly a case indicative of regulatory malaise; again, as Advocate General Vesterdorf commented: "it should be observed that in most of the cases the Commission's arguments have been upheld to a large extent".⁴⁰ Moreover, the six fine reductions were not, overall, very substantial.⁴¹

On the whole, a careful revisiting of Montag's sample does not bear out the argument which asserts that the system was in crisis and legally discredited. Admittedly his list includes some decisions (Wood Pulp, PVC and Soda Ash) which led to some significant legal reverses for the Commission (although that in PVC was overturned in substance by the ECJ). But, looking at the cases in terms of the number of appeals, the points raised in these appeals, and their outcome as individual appeals, the Commission's score sheet appears much stronger. As an examination of the Polypropylene appeal suggests, what was emerging as a main difficulty for the Commission was sufficiency of evidence: proving the case against companies for the whole period suspected. This, it will be seen,

³⁶ Case T-305/94, *LVM v Commission* [1999] E.C.R. II-931. The "twin" decision in relation to the LdPE Cartel went down in the wash of the PVC decision, but the Commission did not re-adopt its LdPE decision in view of the amount of time that had elapsed by the time of the ECJ's judgment in *PVC*. There had by that time been so much industry reorganisation that few of the original companies still existed, rendering it formally difficult to re-adopt the original decision.

³⁷ Case T-1/89, [1991] E.C.R. II-867.

³⁸ The list of participants comprises very much the usual suspects of international cartel activity. For instance, as well as their involvement in the thermoplastic cartels, ICI and Solvay were at this time leading players in the Soda Ash Cartel.

³⁹ Cited above at p.1025.

⁴⁰ Cited above at p.1033.

⁴¹ Petrofina: from 600,000 to 300,000; BASF : from 2,500,000 to 2,125,000; Enichem (ANIC): from 750,000 to 450,000; Huls: from 2,750,000 to 2,337,500; Shell: from 9,000,000 to 8,100,000; ICI: from 10,000,000 to 9,000,000.

would prove to be a continuing theme in our later sample relating to the last decade of cartel cases.

The 1995–2004 sample of cartel cases

A basic profile of the cartel appeals dealt with in the period from 1995 until mid-2004 is presented in Table Two below. This gives a picture of: (a) the cartels giving rise to litigation; (b) the number of appellants within each cartel; and (c) their progress to the CFI and, in some cases, further to the ECJ. One of the most obvious points to emerge from this picture (and already depicted in Montag's earlier survey) relates to the amount of legal work generated by a single cartel investigation and the time taken for the litigation to run its course. Significantly, for instance, during this period of almost 10 years, the Community Courts dealt with no more than sixteen cartels, and some of these had progressed only as far as the CFI, with some further appeals to the ECJ still pending. The number of companies involved was much higher (for instance over 40 in the Cement Cartel alone), and the number of appeal arguments higher still. An important point to bear in mind therefore is the sheer amount of legal work generated by the investigation of a single cartel at this level.

TABLE TWO: Cartel cases taken to appeal during the period 1995–2004

Cartel (in order of court judgment)	Year investigation started + year of Commission decision	Number of cartel members + (appellants, first column CFI, second column ECJ)	CFI judgment	ECJ judgment
1. Welded Steel Mesh	1985 1989	16 (11) (1)	April 6, 1995	July 17, 1997
Soda Ash	1989 1990	2 (2)	June 29, 1995	April 6, 2000 (Commission appeal— unsuccessful)
3. Wood Pulp	1977 1984	43 (7)*	July 10, 1997	October 14, 1999 (Commission appeal— successful)
4. Dutch Mobile Cranes	1992 1993	2 (2)	October 22, 1997	

5. Carton Board	1991 1994	19 (15) (15)	May 14, 1998	November 16, 2000
6. Steel Beams (ESRC)***	1991 1994	18 (11) (7)	March 11, 1999	October 2, 2003
7. PVC (2)**	1983 1994**	12 (12) (9)	April 20, 1999	October 15, 2002
8. Polypropylene	1983 1986	15 (15) (8)	[1991]	July 8, 1999
9. Cement	1989 1994	42 (41) (6)	March 15, 2000	January 7, 2004
10. British Sugar	1990 1999	4 (3) (1)	July 12, 2001	April 29, 2004
11. Stainless Steel (Alloy Surcharge) (ECSC)***	1995 1998	6 (2)	December 13, 2001	
12. Pre-Insulated Pipes (District Heating)	1995 1998	10 (9)	20 March 2002	
13. Lysine (Amino Acids)	1996 2001	5 (4)	July 9, 2003	
14. Greek Ferries	1992 1997	7 (5)	December 11, 2003	
15. Graphite Electrodes (Carbide Graphite)	1997 2002	8 (7)	April 29, 2004	
16. Seamless Steel Tubes	1995 2003	8 (7)	July 8, 2004	

* Appeal from an earlier case (request to remove fines) by one group of cartel participants (the Swedish producers).

** The first decision relating to the PVC Cartel (of 1988) had been annulled, that annulment had been successfully appealed by the Commission, who then re-adopted the decision in 1994.

*** Decisions taken under Art.65 of the ECSC Treaty (substantively analogous to Art.81 of the EC Treaty).

A number of points may be made about the above data by way of preliminary conclusion. First, it may be seen that a typical cartel case will run for about a decade, from the beginning of the Commission's investigation through to the end of the appellate procedure, if the latter includes proceeding to both the CFI and the ECJ. Secondly, although not all cartel decisions are appealed and not all participants appeal, a large proportion of firms implicated in cartels do in fact appeal. From the sample of 16 cartels, there are 217 participating companies (the size of cartels varies considerably, from over

40 members down to just 2—it is difficult to refer to an average number of members). Of those 217 companies, 153 appealed to the CFI (just over 70 per cent of the total). There were, within the period of the survey, a further 47 appeals from those dealt with by the CFI to the ECJ.

A main point of interest, of course, is the outcome of the appeals. Taking the appeals as the main unit of measurement, it may be useful to categorise them into three main groups according to outcome. First, those which may be termed “wholly successful”, in that the applicant succeeded in having the whole of the decision against that party annulled, either on the ground of a procedural defect vitiating the whole decision or because there is insufficient evidence of that party’s participation in the cartel. Secondly, there is a large group of “partly successful” appeals, in which the applicant gains a reduction in the amount of the fine, usually on the ground of proven period or extent of involvement in the cartel, or more exceptionally on grounds of mitigation (leniency or co-operation). Thirdly, there are those applicants who are wholly unsuccessful in that all of their pleas are dismissed (and such parties may well then have all the costs awarded against them). These results are broadly summarised in Table Three below.

TABLE THREE: Cartel appeal outcomes, by success of appeal, CFI and ECJ 1995–2004

Total number of appeals [CFI: 153] [ECJ: 47]	200
Successful	12 [6 per cent]*
Partly successful (fine reduction)	122 [61 per cent]
Unsuccessful	66 [33 per cent]

* But note the comment about the eventual outcome of the Wood Pulp appeals below.

A crude quantitative reading of the above table suggests: (a) a low rate of total success for cartel appellants (well below one in 10 cases); (b) a fair rate of total success for the Commission’s defence (one case in every three); and a significant portion (more than half the total) which result is *some measure* of success for the appellants, in terms of some fine reduction. But clearly the cases in each sample need to be examined more closely and more carefully to understand and to draw argument from these figures.

“Successful” appeals

A first glance at the figures above would suggest a cautious note for would-be cartel appellants—the prospects for complete annulment of the Commission’s decision and removal of the fine do not look good. Indeed, the successful appeals in the sample comprised an odd mixture of cases. Two of these successful appeals were those of companies (Enzo Gutzeit (Carton Board Cartel) and HFB (Pre-Insulated Pipes Cartel)) who succeeded in arguing that there was insufficient evidence of their involvement in the cartels. In a third case, a member of the Steel Beams Cartel, ARBED, succeeded in its

appeal to the ECJ for annulment on the ground that the Statement of Objections was sent to the wrong party, so compromising rights of defence.⁴² Another two comprise the appeals by ICI and Solvay as members of the Soda Ash Cartel. The Soda Ash litigation turned into a test case on the defendant's access to the file and the Commission's decision fell with its defeat on this important point of procedural law.⁴³ But there was no doubt about the reality and significance of the cartel: market sharing in relation to soda ash dated back to the operation of the "Alkali Cartel" in the earlier part of the last century and the notorious "Page 1,000" document, the basis of a market sharing arrangement revived in 1945 and claimed by the parties to have been terminated in 1972 on British entry into the EEC.⁴⁴ The other successful appeals arose from a sequel to the Wood Pulp Cartel litigation, another test case. Seven Swedish members of the Cartel, who had not appealed against the original decision of the Commission and had paid over their fines, subsequently requested the repayment of their fines after the decision was annulled following the appeals by other parties. When the Commission refused to repay the fines in 1995, this decision was challenged successfully, the CFI confirming that the non-appellants should benefit from the general annulment of the decision imposing fines.⁴⁵ However, in the longer term, this was not a "successful" appeal, since the Commission subsequently won its appeal to the ECJ, when the latter in 1999 overturned the CFI's ruling on this point on grounds of legal certainty.⁴⁶ Moreover, the companies were then also ordered to pay all the costs. Arguably then, the seven Wood Pulp appeals should be deducted from the category of successful appeals, then rendering it statistically insignificant.

"Partly successful" appeals: fine reductions

But then the numbers can be viewed very differently, in that they suggest that there is a good rate of success for appellants (just over 60 per cent) in achieving some reduction in the amount of fines imposed by the Commission. Once again, however, it is important to read the evidence closely, and reflect upon the amount of fine reduction and the grounds for changing the amount of the fine. Indeed, we need to be careful about the label, and a closer reading of these cases might suggest that the category should be renamed "largely unsuccessful".

Two main points may be made about the 122 fine reductions in our sample. First, they are based predominantly on insufficient evidence of all the alleged participation in the cartel—for instance, duration of involvement, or attendance at certain meetings. To a large extent, therefore they follow from the CFI's role in reviewing the evidence, rather than demonstrating any lack of procedural rigour and consequently unfair treatment on the Commission's part. Nor do they undermine the main charge against these parties: in most cases the CFI in effect confirmed major involvement in the alleged cartel. This aspect of these cases is reflected to some extent in the award of costs, since sometimes, despite achieving a reduction in the amount of fine, the appellant was ordered to pay not only its own costs but also a proportion of the Commission's costs. Secondly, it is difficult to

⁴² Case C-176/99P, *ARBED v Commission* [2003] E.C.R. I.

⁴³ See the discussion in Harding and Joshua, n.3 above, at pp.199–201.

⁴⁴ For details of the history of these arrangements, see the Commission's decision in *Soda Ash* [1991] O.J. L152/1, at p.4 *et seq.*

⁴⁵ Case T-227/95, *AssiDomän Kraft Products v. Commission* [1997] E.C.R. II-1185.

⁴⁶ Case C-310/97 P, *Commission v AssiDomän Kraft Products* [1999] E.C.R. I-5363.

generalise about the amount of fine reduction, since this may be a greater or lesser proportion of the original fine, depending on the facts—especially the extent of the insufficiently proven or unproven participation. Such variation in outcome is illustrated in Table Four, showing the levels of fine reduction achieved by one set of cartel appellants, those involved in the Steel Beams Cartel.

TABLE FOUR: fine reductions, Steel Beams Cartel

Company	Commission fine (ECUs)	CFI reduced fine (ECUs)
Thyssen Stahl	6,500,000	4,400,000
NMH	150,000	110,000
Eurofer		[application dismissed—fine stands]
ARBED	11,200,000	10,000,000 [but decision and fine later annulled by ECJ]
Cockerill	4,000,000	3,580,000
Krupp Hoesch	13,000,000	9,000,000
Preussag	9,500,000	8,600,000
British Steel	32,000,000	20,000,000
Unimétal	12,300,000	8,300,000
Aristrain	10,600,000	7,100,000
Ensidesa	4,000,000	3,350,000

Thus, for example, Cockerill and Preussag both achieved roughly 10 per cent reductions in their fines, compared to Krupp Hoesch gaining around 30 per cent reduction and British Steel around 37 per cent. But then again, British Steel's fine of 32 million ECUs was large in the first place.

"Unsuccessful" appeals

Within our sample, roughly one appeal in every three was successfully defended by the Commission on every count. At the level of appeals to the ECJ, the Commission's success rate was higher: 34 out of 47 appeals (72 per cent) were totally unsuccessful. Also, before the ECJ, the Commission lost one appeal (Soda Ash—two parties) and won its other appeal (Wood Pulp—seven parties). In such cases there would appear to be a high cost to the appellants: losing on all the legal arguments, fines affirmed and having to pay costs for both sides. If legal costs and the size of the fines are taken into account, that would seem to be an expensive matter, unless we contemplate the cynical argument that there may be a considerable economic gain in delaying the final legal outcome for a number of years and tying up the Commission's resources in fighting litigation.

Some conclusions and reflections

It is possible both to draw some wider conclusions and to raise some questions from this survey of the two samples of European cartel litigation over roughly the last 20 years.

In the first place, the material confirms the assertion, made a number of times in the above discussion, that cartel appeals constitute a significant legal industry at the European level. Simply glancing at the length and detail of the reported judgments of the CFI and ECJ in this area of case law provides an impression of the amount of work, time and resources committed to this sector of litigation. The costing of this activity would require economic expertise beyond the scope of this paper. But we may still offer some more impressionistic observations and questions on this aspect of the subject.

One reflection arises from what was said immediately above in relation to the 1995 to 2004 sample and generally relates to the utility of such an extensive practice of appeal. It is naturally intriguing to speculate about who gains what from this process. On the whole the appellants would seem to gain little directly, apart from a reasonable prospect of some reduction in the amount of fines. It seems rare now for the Commission to be defeated on major issues of legal principle and its seminal setbacks in cases such as *Wood Pulp*, *PVC(1)* and *Soda Ash* are receding into history. Most of the appellant arguments are knocked down, by both the CFI and the ECJ. Certainly, the case made out by Montag in his paper in 1996, alleging a state of legal crisis in the Commission's enforcement of the competition rules, cannot be sustained from the evidence of the later sample—nor, we would argue, from the evidence in his own sample.

Certain questions therefore present themselves. What do the companies (or their legal advisers) believe that they will gain, apart from some chance of a reduced fine, in making so many appeals? How do they calculate the economic cost of the appeals? Does the explanation lie in a cynical manipulation of legal process—a tactic of delaying the imposition of sanctions and tying up the Commission's resources? Is the whole business simply a product of an entrenched adversarial culture, in which these companies (especially considering the recidivist character of some of them)⁴⁷ are psychologically conditioned to fight to the bitter end? All of these questions invite further (but perhaps difficult) research.

Admittedly, it may be said that there is an objective gain within the legal order, in that the appellate process guarantees and demonstrates the good health of the regulatory system. Montag argued that there was a strong feeling, and also evidence, of regulatory malaise. Appeals to the CFI provide a means of testing that claim and, if necessary, exposing and remedying the malaise. Even if the appeals show that, after all, the system is working quite well, it is still necessary to know that and to encourage good practice through such monitoring of the regulators' practice. Nonetheless, it may still be questioned whether it is necessary to maintain such an extensive and detailed process of review for such a purpose. This may be an increasingly persuasive objection once the point is reached where

⁴⁷ This is an interesting reflection. Many of the "repeat players" may be characterised as "powerful but embattled" economic actors. Although some of these companies are transnational corporations, a high proportion are located within the declining manufacturing sector, now enjoying a lesser share of the global economy compared to the burgeoning services sector. For some background analysis, see: Sarah Anderson and John Cavanagh, "Top 200: The Rise of Corporate Global Power" Institute of Policy Studies, 1996 and 2000.

relatively good health rather than substantial malaise appears to be the characteristic of the system as a whole. After all, how many other areas of regulatory practice are subject to such intensive legal scrutiny—is this a reflection of the economic resources of the regulated parties in this context? Put more simply: does the system require so many appeals and so much fine-toothed combing of the Commission's decisions to ensure good practice?

This then brings the discussion back to the earlier point about the role of the CFI. While one of the original aims may have been for the CFI to serve as a guarantor of regulatory rigour and fair dealing, that has appeared, with the passage of time, to have become less of a vital or necessary role. Its main function in the cartel appeals now seems to be that of a sentencing moderator. In this sense, it is also a relatively technical role: assessing the sufficiency of evidence and adjusting the quantum of fines by applying mathematical criteria. A similar observation may be made of the role of defence lawyers. If they are to advise their clients effectively and give them value for money, a main task would seem to be to consider the strength of evidence and advise on the chances of fine reduction—in other words, damage limitation rather than complete exculpation.

And this leads finally to an observation regarding the underlying culture in this area of European legal process. There would appear to be grounds for saying that the main function now of the corporate defence lawyer in this adversarial sector of competition regulation is to advise on leniency pleas and fine reductions. Both advisory roles proceed from an assumption of guilty behaviour, something which is reinforced by the awesome level of recidivism on the part of major companies who appear as usual suspects in the world of business cartels. In short, this suggests a confirmed culture of business delinquency. There have been official claims recently that leniency programmes, heavy fines and possible prison terms for company executives have started to have a real impact in the legal battle against cartels. But one of the striking impressions to emerge from the material above is one of resilience and fighting determination on the part of many of those corporate actors at the sharp end of this process of regulation.